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9
10 **IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN MARIANA ISLANDS**

12 IMPERIAL PACIFIC INTERNATIONAL
13 (CNMI) LLC

14 vs.
15 Plaintiffs,

16 COMMONWEALTH OF THE
17 NORTHERN MARIANA ISLANDS, the
18 COMMONWEALTH CASINO
19 COMMISSION, ARNOLD PALACIOS,
20 GOVERNOR OF CNMI, in his official and
21 personal capacities, et. al.,

22 Defendants.

23 CIVIL CASE NO. 1:24-CV-0001

24 **DEFENDANT COMMONWEALTH OF
25 THE NORTHERN MARIANA ISLANDS'
REPLY IN SUPPORT OF ITS MOTION
TO DISMISS PLAINTIFFS' SECOND
AMENDED COMPLAINT PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE
8(a), 17(b), 12(b)(1) and 12(b)(6)**

26 **Hearing Date:**

27 **Hearing Time:**

28 **Judge: Hon. Judge David Carter**

29
30 Defendant Commonwealth of the Northern Mariana Islands respectfully submits this
31 Reply in support of its motion to dismiss Plaintiffs' Second Amended Complaint ("SAC")
32 pursuant to Federal Rules of Civil Procedure 8(a), 17(b), 12(b)(1) and 12(b)(6).

33 //

I. Background

On August 13, 2024, the Commonwealth of the Northern Mariana Islands filed its Motion to Dismiss the Second Amended Complaint of Plaintiffs arguing that Plaintiff Best Sunshine lacks capacity to be sued; that the SAC fails to allege any actions taken by the Commonwealth proper; that the suit is not ripe for adjudication; that res judicata bars Plaintiffs from seeking to overturn the prior decisions of the agency which were affirmed by the NMI Supreme Court and United States Supreme Court and bars them from raising issues which could and should have been raised in the prior litigations; that the Commonwealth should enjoy sovereign immunity like every other state and territory in federal court as such sovereign immunity is found outside the Eleventh Amendment; and that the Commonwealth Casino Commission (“CCC”) is not a sue or be sued entity and as such any action against the CCC would be an action against the Commonwealth.

On August 27, 2024, Plaintiffs filed their Opposition arguing that they should be granted leave to amend to correct their continued deficiencies. This Court should deny the Motion to Amend and grant the Defendant's Motion to Dismiss with prejudice.

II. Legal Standard

III. Argument

1. Plaintiff Admits Best Sunshine International Ltd, is No Longer an Entity and Lacks Capacity to Sue Since 2023.

Plaintiff Best Sunshine International Ltd. (BVI) (“Best Sunshine”) admits that it has lacked a registered agent since April 7, 2023 when it was dissolved. [CITE] However, after attempting to hoodwink the parties and Court, Plaintiffs now ask for leave to remove Best Sunshine as a party in the Third Amended Complaint (“TAC”). By tacitly admitting that Best Sunshine does not exist, Plaintiffs are admitting that they did not do their due diligence in including Best Sunshine as a party in the SAC. Such a gaffe in representation should be met by this Court with sanctions under its inherent powers by dismissing Best Sunshine from the suit with prejudice. The Court should also sanction counsel under its inherent powers for causing delays in litigation. *See Chambers v. NASCO, Inc.* 501 US 32, 44-45 (1991) (finding inherent power to sanction outside of Rule 11 and statutes). In *Chambers*, the Supreme Court found that district courts had inherent power found outside the civil rules and statutes to sanction parties and counsel. *Id.* (“We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described

1 above.”). The type of bad conduct that could result in sanctions is exactly the behavior exhibited
 2 in this case.

3 Best Sunshine was included in the SAC without any investigation into its status as a
 4 company. This clearly raises concerns about who authorized anyone to file on its behalf, as the
 5 company did not exist. Further, the filing of the SAC required a whole new round of motions and
 6 briefing. *See* ECF 59 (motion to dismiss), ECF 60 (motion to dismiss), ECF 61 (motion to
 7 dismiss). In turn, Plaintiffs seek another amendment to drop Best Sunshine from litigation, which
 8 would have the effect of once again mooting all the responsive pleadings. This tactic shows that
 9 Plaintiffs are causing delay because Plaintiffs could have easily corrected this through their own
 10 motion to dismiss or by seeking a stipulation to dismiss. Instead, it is clear Plaintiffs intend to
 11 use this material error to give it the opportunity to file a TAC, and then (if it is able to re-instate
 12 Best Sunshine as a company that has capacity to sue) include it in a Fourth Amended Complaint.
 13 This clearly is a pattern to seek delay, which the United States Supreme Court found sufficient
 14 for sanctions. *See Chambers*, 501 US at 46 (finding a court may assess sanctions and attorney’s
 15 fees under its inherent power “when a party shows bad faith by delaying or disrupting the
 16 litigation”). Therefore, the Court should dismiss Best Sunshine from the litigation with prejudice
 17 and assess attorney’s fees against its counsel.

18 **2. Plaintiff Materially Misunderstands and Mischaracterizes the Commonwealth’s
 19 Arguments.**

20 Under Federal Rule of Civil Procedure 8(a), Plaintiff is required to sufficiently plead a
 21 cause of action against each Defendant. IPI has not alleged any actions by the Commonwealth
 22 itself, and what little allegations it does raise against the Commonwealth through its agencies are
 23 not actions of the Commonwealth as a government entity, but rather are allegations against its
 24 branches and agencies where such accusations would be more properly brought against the
 25 government officials who enforce such statutory provisions.¹ *See Sofamor Danek Gorup, Inc. v.*
Brown, 124 F.3d 1179, 1183-84 (9th Cir. 1997) (stating the general principle that challenges to
 26 constitutionality of a statute are properly brought against officers of the state and not the state
 27 itself because of sovereign immunity). Plaintiffs’ only allegations directed at the
 28 Commonwealth’s agencies are contained in paragraphs 6, 92-95, 112, 114, 116, and 125.

¹ The Commonwealth also asserts sovereign immunity as a ground for dismissal. That argument is contained below.

1 Plaintiffs materially misunderstand the Commonwealth's arguments regarding why the
 2 SAC is insufficient to make claims against the Commonwealth proper directly.

3 For Plaintiffs' First Cause of Action, Plaintiffs argue that both the annual regulatory fee
 4 statute and the requirement for minimal capital violate the contracts clause of the United States
 5 Constitution for the period during which it was shut down for Covid-19, which it argues was a
 6 *force majeure* event. SAC ¶¶ 105-107. Plaintiffs make the same argument as to the application
 7 for the demand of payment. SAC ¶ 109. Plaintiffs then allege collusion as part of their
 8 unconstitutional impairment claim. SAC ¶¶ 112 and 114.

9 As to the constitutional claims, the mere enactment of a statute is not enough to bring a
 10 charge against the Commonwealth proper, and such charges should be brought against officials
 11 responsible for the enforcement of the statutory provisions. *See Sofamor Danek Gorup, Inc. v.*
 12 *Brown*, 124 F.3d 1179, 1183-84 (9th Cir. 1997). To the extent Plaintiffs are bringing claims
 13 against the Commonwealth for enacting a statute, the Commonwealth is the wrong party, and the
 14 allegations of merely passing a law are insufficient to establish a cause of action against it. *See*
 15 *Sofamor*, 124 F.3d at 1183. As to the claims of collusion, the mere passing of a statute does not
 16 establish collusion and thus Plaintiffs failed to properly plead any collusion at all between the
 17 Commonwealth and any other individual. Therefore, to the extent Plaintiffs seek action against
 18 the Commonwealth for merely passing a law, Plaintiffs are going against the wrong party. The
 19 First Cause of Action also is not brought under 19 USC § 1983, which also does not apply to the
 20 Commonwealth proper.

21 Plaintiffs then counter that the proper thing would be to substitute the Commonwealth
 22 out and bring in the parties against whom it can bring suit. The cases relied on by Plaintiffs are
 23 in error and actually support the Commonwealth's position. In *Norita v. Commonwealth of the*
 24 *Northern Mariana Islands DPS*, the claims were brought pursuant to the Government Liability
 25 Act ("GLA") where substitution is required by statute for when employees of the Commonwealth
 26 are sued for actions undertaken in their scope of employment. 2019 WL 150875 (D. N. Mar. I.
 27 January 10, 2019). This is not a GLA claim. Further, the Court dismissed the agency which was
 28 improperly sued because it was not a sue or be sued entity. *Id.* at *6-8. ("Because DPS lacks the
 capacity to sue or be sued under Commonwealth law, it is DISMISSED from the case"). As such,
 the Commonwealth should be dismissed from the First Cause of Action.

1 For the Second Cause of Action, Plaintiffs bring a § 1983 claim against the
 2 Commonwealth for alleged due process clause violations. The only mention of the
 3 Commonwealth proper is paragraph 125, which alleges that the Commonwealth directed the
 4 Commissioners to not disqualify themselves. SAC ¶ 125. This is a bald assertion with no factual
 5 allegations surrounding it. Further, it does not allege any way in which the Commonwealth
 6 directed the Commissioners other than by passing a statute. Merely passing a law cannot sustain
 7 an allegation that the Commonwealth engaged in acts directing the Commissioners to take any
 8 specific action regarding their recusal decisions.

9 Plaintiffs next argue that § 1983 claims are allowed against the government directly when
 10 requesting injunctive relief. Opp. at 10. However, Plaintiff is not requesting *the Commonwealth*
 11 to do or not do anything. It is requesting for the Commissioners of CCC to stop the revocation
 12 proceeding and to stop enforcement of a statute and regulations during a specific period of time.
 13 *See* Prayer for Relief. Neither of these implicate the Commonwealth directly. If a statute is
 14 declared unconstitutional as applied during a *force majeure* event, that does not render the whole
 15 statute unconstitutional, but only as applied during a specific time period that has now passed. If
 16 the Court were to declare the whole statutory scheme unconstitutional, the Court cannot order
 17 the passing of a new statute; rather, it would be up to the Legislature to pass a new statute that
 18 meets the constitutional qualifications as outlined by the Court. Either way, the Commonwealth
 19 sovereign is not enjoined from any action. Thus, even as to a § 1983 claim, Plaintiffs have not
 20 made sufficient allegations and requests for relief against the Commonwealth, and the
 21 Commonwealth should be dismissed from the Second Cause of Action.

22 Finally, Plaintiffs contend that the Commonwealth is arguing both sides of the same coin.
 23 Opp. at 9. However, Plaintiffs are incorrect in assuming that the law must provide a remedy
 24 against either the Commonwealth or CCC in this forum. Plaintiffs cannot sue either party in
 25 federal court because CCC is not a sue or be sued entity and the Commonwealth has sovereign
 26 immunity. Thus, Plaintiffs are more properly left to their state law remedies through a judicial
 27 review action to address the actions taken by CCC.

28 **3. The Issues are Not Ripe for Judicial Review.**

29 Plaintiffs' claims are not ripe for judicial review because it is not clear that the casino
 30 license will be revoked.

1 Plaintiffs argue that no decision by CCC regarding revocation of its license even needs
 2 to be reached because their right to a hearing officer means the case is ripe. For support, Plaintiffs
 3 rely on one single case: *Foothills Christian Ministries v. Johnson*, 2024 WL 2305282 (S.D. Cal.
 4 May 20, 2024) (currently on appeal). First, it is notable that the lawsuit challenging the scheme
 5 of licensure and regulation under the California Child Day Care Facilities Act is not brought
 6 against California, but against the individuals in their official capacity assigned to enforce the
 7 Act. Second, the challenge is against the entire Act and not just as applied in a particular way
 8 and instance in time— both arguments Plaintiffs raise get them around the res judicata issue.
 9 Third, the case does not support Plaintiffs.

10 The *Foothills* case deals primarily with standing (who can sue) as opposed to ripeness
 11 (whether the suit can be decided at this time). *Id.* While certain aspects of standing and ripeness
 12 may overlap and be analyzed the same in some cases, there is also the prong of ripeness that deals
 13 with “prudential ripeness,” which is what the Commonwealth alleges here— that the case is not
 14 fit for judicial intervention because the harm to be suffered may not happen at all. *See Colwell v.*
 15 *Department of Health and Human Services*, 558 F.3d 1112, 1123-24 (9th Cir. 2009). In *Colwell*,
 16 the primary issue was whether the new guidance issued by the Department of Health and Human
 17 Services was a regulation or a policy statement. The Court found the issue was not fit for judicial
 18 determination because it was not clear which way the agency would go in its enforcement. Here,
 19 quite similarly, there is no guarantee that CCC will revoke the casino license. Indeed, as Plaintiffs
 20 concede, a new member is in the process of being appointed and confirmed (although this too is
 21 not guaranteed). If such were to occur, that new member would lack the taint complained of by
 22 Plaintiffs and would be the neutral third party Plaintiffs seek. Thus, the suit is not ripe for judicial
 23 decision. Further, waiting until CCC has made a decision to allow an action to proceed would
 24 also serve the purpose of judicial economy, as Plaintiffs would have no reason to further amend
 the Complaint to fit every circumstance. Thus, the Court should dismiss the case for lack of
 ripeness until a revocation decision is made.

25 **4. Res Judicata Bars Plaintiff’s Suit.**

26 Plaintiff argues that res judicata does not apply because the “bright-line rule” of *Flores*
 27 *v. Life Insurance Company of North America*, 2024 WL 222265 (9th Cir. 2024) applies in a way
 28 that any “events” occurring after the filing of the first complaint are not barred. Opp. at 12. This
 is not what *Flores* actually holds. *Flores* acknowledges the bright line rule, but the purpose of

1 the rule is to analyze the fourth factor (whether the suits arise out of the same transactional
 2 nucleus of facts) of the test to identify whether there is an identity of claims for applying res
 3 judicata. Further, the test is not mechanistic and the fourth factor is most important. *Flores*, 2024
 4 WL 222265 at *1.

5 The issue here is that each of Plaintiffs' claims alleging that the entire statutory and
 6 regulatory scheme of licensing and regulating the casino license is unconstitutional could have
 7 been brought in the prior suits. The ability of such claims to have been brought previously is clear
 8 from Plaintiffs' request to "vacate, nullify any and all adverse administrative decisions against
 9 IPI that were based upon the assumption of jurisdiction by CCC to interpret the terms of the CLA
 10 and/or to adjudicate claims arising out of the CLA, when such disputes are not related to the
 11 gaming operations of IPI, and the scope of such disputes shall be narrowly construed." Prayer
 12 for Relief ¶ 6. Plaintiffs also request for the entire scheme to be held unconstitutional. This too
 13 could have been raised in the prior litigation, as it was the same decision-making body applying
 14 the same statutes and regulations that decided the suspension. As such, Plaintiffs' suit should be
 15 barred by res judicata.

16 5. The Commonwealth Should Be Granted Full Sovereign Immunity.

17 Plaintiffs merely contend that the issue of sovereign immunity is settled, but ignore that the
 18 Commonwealth may still argue in good faith for reversal of existing law. Further, the
 19 implications that a court decision barring this suit on grounds of sovereign immunity would have
 20 on this case and future cases is immense. Thus, the Commonwealth continues to argue for its
 21 proper place among United States jurisprudence in seeking its own self-determination and
 22 governance. As such, it should be afforded the sovereign immunity that is found outside of the
 23 Eleventh Amendment as the Supreme Court established in *Alden v. Maine*, 527 U.S. 706 (1999).
 24 Such arguments in good faith for the reversal of existing precedent have recently succeeded in the
 25 U.S. Supreme Court. See, e.g., *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215
 26 (2022) & *Loper Bright Enter. V. Raimondo*, 144 S.Ct. 2244 (2024). In order for those cases to
 27 reach the United States Supreme Court, both cases had to traverse the district and appellate
 28 courts. The Commonwealth intends to do the same here as such is allowed under ABA Model
 Rule 3.1.²

² ABA Model Rule 3.1 allows attorneys to argue in good faith for "extension, modification, or reversal of existing law."

1 While *Fleming v. Department of Public Safety*, 837 F.2d 401 (9th Cir. 1988), clearly
 2 decided that the Eleventh Amendment immunity did not apply to the CNMI due to the
 3 amendment's omission from the Covenant, *Fleming*'s holding that common law sovereign
 4 immunity was waived by "implication" is on tenuous grounds.³ The *Fleming* holding that the
 5 CNMI does not enjoy common law sovereign immunity was expressly passed over by the Ninth
 6 Circuit because it held the waiver of sovereign immunity was broad:

7 The Department also claims that the Commonwealth enjoys common law sovereign
 8 immunity, and that *Fleming*'s suit is barred even if the eleventh amendment is not
 9 applicable. The Department cites *Pennhurst State School & Hospital v. Halderman*,
 10 465 U.S. 89 (1984), for the proposition that common law sovereign immunity
 11 constitutes an independent limitation on courts' Article III jurisdiction to hear cases
 12 against states. We do not reach this question, because we conclude that in entering
 13 into the Covenant the Commonwealth impliedly waived whatever immunity it might
 14 otherwise have enjoyed against suits in federal court arising under federal law.

15 *Id.* at 407 (emphasis added). From this, it is clear that two types of sovereign immunity exist:
 16 common law sovereign immunity and eleventh amendment sovereign immunity. *Fleming*'s
 17 rationale is that by entering into the Covenant, the CNMI waived both because "there is simply
 18 no meaningful distinction between eleventh amendment immunity and common law
 19 sovereign immunity insofar as federal suits are concerned." *Id.* (emphasis added). *Fleming*
 20 never gets to the question of the Commonwealth's common law sovereign immunity because it
 21 finds there to be no distinction. It is this basis that provides the crack under which *Fleming*'s
 22 rationale and reasoning can no longer be reconciled with further developments. *See Manila v.*
 23 *Department of Corrections*, 2019 WL 324424 at *3 (D. N. Mar. Is. Jan. 24, 2019) (basing its
 24 decision on *Fleming* not being "clearly irreconcilable with the reasoning or theory of intervening
 25 higher authority").

26 *Alden v. Maine*, 527 U.S. 706 (1999) provides the hammer which shows that eleventh
 27 amendment immunity and common law sovereign immunity are not indistinguishable (as the
 28 *Fleming* court found), and thus this Court should find *Alden* irreconcilable with *Fleming*. *Alden*
 29 specifically finds that there is immunity outside of the eleventh amendment:

30 We have, as a result, sometimes referred to the States' immunity from suit as
 31 "Eleventh Amendment immunity." The phrase is convenient shorthand but

32 ³ *Fleming*'s other primary holding that the CNMI was a "person" under § 1983 has already been overturned.
 33 *See Norita v. Northern Mariana Islands*, 331 F.3d 690, 696 (9th Cir. 2003).

1 something of a misnomer, for the sovereign immunity of the States neither
 2 derives from, nor is limited by, the terms of the Eleventh Amendment.

3 *Alden*, 527 U.S. at 713 (emphasis added). When this Court examined the issue in *Manila*, it did
 4 not examine this portion of *Alden* or explain why it is not irreconcilable. Instead, the Court relied
 5 on *Norita v. Northern Mariana Islands*, 331 F.3d 690 (9th Cir. 2003) to find that *Alden* was *not*
 6 irreconcilable with *Fleming*. However, *Norita*, carefully avoids the problem presented by *Alden*
 7 and sidesteps the issue.

8 *Norita* pays homage to *Alden* and its holding that sovereign immunity is derived not from
 9 the eleventh amendment, but by the inherent sovereign immunity of being a sovereign (*i.e.*,
 10 common law sovereign immunity). However, when push comes to shove, *Norita* explicitly skips
 11 *Alden*: “The principles CNMI relies on from the Supreme Court’s recently clarified Eleventh
 12 Amendment jurisprudence in support of its assertion of sovereign immunity here predate
 13 *Fleming*.” The *Norita* court then lists out three cases that do predate *Fleming*: *Hans v. Louisiana*,
 14 134 U.S. 1 (1980); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); and *Edelman v.*
 15 *Jordan*, 415 U.S. 651 (1974). Conspicuously absent is the 1999 case of *Alden v. Maine*, 527 U.S.
 16 706 (1999). *Fleming* was decided in 1988 and *Alden* in 1999, so it is not clear why the Ninth
 17 Circuit did not discuss it. Further complicating the matter, the *Norita* court separates the issue of
 18 eleventh amendment and common law sovereign immunity and states: “We have found no
 19 closely-on-point intervening Supreme Court decision undermining *Fleming*’s holding that the
 20 CNMI is not entitled to an Eleventh Amendment defense.” *Norita*, 331 F.3d at 696. This is
 21 definitely true. But *Alden* again undermines this by finding sovereign immunity exists as an
 22 inherent status outside of the eleventh amendment. If that is not enough, another 1999 case also
 23 finds “that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in
 24 favor of the sovereign.” *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). The
 25 failure to include the eleventh amendment in the Covenant would only function to waive eleventh
 26 amendment immunity, and not common law immunity.

27 Thus, the decisions in *Fleming* and *Norita* continue to build upon one another, but start
 28 with a shaky foundation that proclaims there is no distinction between eleventh amendment and
 common law sovereign immunity, and then fail to analyze *Alden*’s holding that there is a
 distinction and that *Department of Army* makes any waiver be strictly construed in terms of its
 scope to favor the sovereign. The shaky walls are then built by ignoring Supreme Court precedent

1 that was decided after *Fleming* and clearly makes the holding of *Fleming* that there is no
 2 distinguishing between eleventh amendment sovereign immunity and common law sovereign
 3 immunity irreconcilable with that subsequent precedent. It is time to bring the Commonwealth
 4 into alignment with the other United States jurisdictions and find that the Commonwealth has
 5 common law sovereign immunity because the holding of *Fleming* that the CNMI does not have
 6 common law sovereign immunity because eleventh amendment and common law sovereign
 7 immunity are not distinguishable can no longer be reconciled with *Alden*.

8 **6. The CCC Should Be Dismissed As It Is Not A Sue Or Be Sued Entity.**

9 Plaintiffs also list CCC as a party to this action. FAC (ECF 38) at ¶ 6. Plaintiffs argue that
 10 the issue is moot because CCC filed an answer and thus waived its right to make such a challenge.
 11 However, Plaintiffs ignore their own argument that CCC is a way to get at the Commonwealth.
 12 The implications for this are important. If CCC is not a sue or be sued entity, then CCC cannot
 13 be sued and the claims against it would need to be alleged against the Commonwealth (assuming
 14 that the Court finds against the Commonwealth as to sovereign immunity). Further, if the claim
 15 is against the Commonwealth, then CCC's filing of an Answer is a non-issue because the right
 16 is held by the Commonwealth as the party to be sued.

17 **IV. CONCLUSION**

18 For the foregoing reasons, Defendant respectfully moves to dismiss this suit pursuant to
 19 Federal Rule of Civil Procedure 17(b)(2) and 12(b)(1) and (6).

20 Respectfully submitted,

21 **OFFICE OF THE ATTORNEY GENERAL**
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24 Date: September 3, 2024

25 /s/ *J. Robert Glass, Jr.*

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